



**CUI//SP-MIL/SP-PRVCY**

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-02026

*Work-Product*

**COUNSEL:** *Work-Product*

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

His Article 15, *Record of Nonjudicial Punishment (NJP) Proceedings*, be expunged and removed from his Officer Selection Brief and his MPerRGp (Master Personnel Record Group).

**APPLICANT'S CONTENTIONS**

His wing commander ordered the early removal of the Article 15 from his record pursuant to AFI 36-2806, *Military Personnel Records System*, 26 Oct 15, paragraph 7.11.3.2 which states "The wing commander or review authority makes the early removal decision via a memorandum forwarding the approved early removal decision to the officer's immediate commander." However, after the NJP was properly removed from his record, a few months later it was erroneously re-entered into his OSR and other records.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is an Air Force captain (O-3).

On 1 Jul 19, after consulting with counsel, waiving his rights to court-martial and accepting nonjudicial punishment, and providing a written presentation, the applicant was issued an Article 15 by the Commander, Air Force (xx AF/CC), under the Uniform Code of Military Justice (UCMJ) in violation of Article 113, *Drunken or reckless operation of a vehicle, aircraft or vessel*, for the following: "You, did, at or near xxxxxx Air Force Base, xxx, on or about 22 May 19, physically control a vehicle, to wit: an all-terrain vehicle while drunk."

On 3 Jul 19, according to the applicant's memorandum, *Waiver of Article 15 Appeal Time*, the applicant stated he is fully aware of his rights and waived any excess time remaining of the five day period in which to make an appeal decision, submitted materials and choose not to appeal.

On 16 Jul 19, the applicant acknowledged he has been informed of the xx AF/CC's decision to file the NJP action in his OSR and this action will also be filed in his Unfavorable Information File (UIF).

On 15 Dec 20, according to the memorandum, *Removal of Article 15 from Officer Selection Record - <applicant>*, the Air Mobility Wing Commander (AMW/CC), in accordance with AFI 36-2608, paragraph 7.11.3, directed early removal of the Article 15 from the applicant's OSR.

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For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

**APPLICABLE AUTHORITY/GUIDANCE**

On 26 February 2021, the Secretary of the Air Force ordered a policy change via a Department of the Air Force Policy Memorandum (DAFPM) 2021-36-03 on *Adverse Information for Total Force Officer Selection Boards* to comply with Section 502 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, signed on 20 December 2019, as codified in title 10 United States Code, section 615(a)(3).

The new law, DoD policy, and subsequent Air Force policy require all adverse information to be filed in the officer's master personnel records group and Officer's Selection Record for consideration by both Regular and Reserve promotion selection, special selection, federal recognition, and selective continuation boards to the grade of O-4 and above, to include promotion processes to the grade of O-3 that involve adverse information that received significant media attention or is of interest to the Senate Armed Services Committee. These changes came into effect for all promotion boards convening on or after 1 Mar 2020 and include historic adverse information previously issued on or after 1 Jan 12 and Article 15s and approved court-martial findings dated prior to 1 Jan 12. It further removed the authority for Wing commanders, delta commanders, or issuing authorities to direct removal of derogatory data from the OSR as previously permissible in AFI 36-2907, *Adverse Administrative Actions*, paragraph 3.4.3.1, and AFI 36-2608, *Military Personnel Records*, paragraphs 7.10 through 7.12 (and their subparagraphs), 8.3.8, and 8.3.15 (and its subparagraphs). Adverse information that requires mandatory filing in the Officer Selection Record (OSR) and the Master Personnel Records Group (MPerRGp) includes, but is not limited to:

1. Any substantiated adverse findings or conclusions from an officially documented investigation or inquiry, regardless of whether command action was taken as a result.
2. Approved court-martial findings of guilt (Court-Martial Orders).
3. Nonjudicial punishment pursuant to Article 15, Uniform Code of Military Justice.
4. Letters of Reprimand.
5. Letters of Admonishment.
6. Notices of Relief of Command (for cause).
7. Letters of Counseling related to a substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

Moreover, the DAFPM states "waivers to this policy are not permitted" and all adverse information as defined by the policy will be permanently placed in the MPerRGp. Except for the set aside of a court-martial or NJP action, removal of adverse information from the MPerRGp may only be directed pursuant to an Air Force Board for Correction of Military Records (AFBCMR) recommendation.

As such the AFBCMR is now the sole removal authority for adverse actions. This is not a different type of review for the AFBCMR. Rather, it falls under the Board's existing review authority for corrections resulting from an error or injustice.

In accordance with DAFI 36-2608, paragraph 6.9, *When to Remove an NJP from an Officer Selection Record or an Electronic Senior Noncommissioned Officer Selection Record and an eMPerRGp*, paragraph 6.9.1, Removal procedures for officers (colonels and below), states to maintain the NJP in the selection record for ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge

and confinement for more than one year. In those cases, keep the NJP in the selection record permanently. Further, it states the NJP is permanently retained in the eMPerRGp (Correspondence and Miscellaneous Group) unless set aside in its entirety in accordance with AFI 51-202, or its removal is directed by the AFBCMR.

In accordance with DAFI 36-2907, paragraph 1.2. *Adverse Information for Total Force Officer Selection Boards Overview*, all adverse information an officer receives will be filed in the OSR and will be considered by promotion selection, special selection, federal recognition (ANG specific), and selective continuation boards to the grade of O-4 and above (to include processes for O-3 promotions that have “extraordinary adverse information” per DoDI 1320.14, *DoD Commissioned Officer Promotion Program Procedures*). Further, paragraph 1.2.8 specifically addresses “historic adverse information” and states “this direction applies even in those situations in which a commander elected not to file the adverse action in an OSR or to where the adverse information was removed from an OSR pursuant to previous guidance.”

### **AIR FORCE EVALUATION**

AF/JAJI recommends denying the request as the re-entry of the applicant’s NJP record into his OSR was consistent with current guidance and they find no error. Their advisory narrowly focuses on the question of error only, and they do not opine on whether the re-entry of the applicant’s NJP into his OSR was unjust, and instead defers that determination to the Board. The applicant does not allege there was an error or injustice NJP action, rather, he alleges an error occurred when the record of the NJP was reentered into his OSR and other records. However, after careful review, they conclude there was no error because the applicant’s NJP was re-entered into his record pursuant to Air Force, Department of Defense (DoD), and Congressional mandates.

In 2020, his Wing Commander (WG/CC) ordered the removal of the applicant’s NJP record from his OSR pursuant to then-applicable AFI 36-2604, dated 26 Oct 15, paragraph 7.11.3.2. Although the WG/CC’s action was authorized at the time, commanders can no longer remove adverse information from officers’ records. Congress, through the fiscal year 2020 NDAA, required the military to furnish adverse information to selection boards considering active duty officers for promotion to major (O-4) and above. On 16 Dec 20, DoD Instruction (DoDI) 1320.14 was issued to implement the Congressionally-mandated change. On 26 Feb 21, the Secretary of the Air Force ordered a policy change via a DAFPM 2021-36-03 on *Adverse Information for Total Force Officer Selection Boards* to comply with the NDAA and the DoDI. The DAFI 36-2608, *Military Personnel Records*, dated 16 Apr 21, paragraph 6.9, and DAFI 36-2907, *Adverse Administrative Actions*, dated 14 Oct 22, paragraph 1.2 are the current applicable instructions governing the removal of NJP records, and neither permit’s the WG/CC’s removal order.

The complete advisory opinion is at Exhibit C.

### **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 12 Sep 23 for comment (Exhibit D), but has received no response.

### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Although the WG/CC’s action was authorized at the time, the Board notes, in accordance with DAFI 36-2907, *Adverse Administrative Actions* commanders can no longer remove adverse information from officers’ records. Furthermore, the Board finds the applicant clearly accepted the Article 15 and elected not to demand trial by court-martial. Additionally, the Congressional-mandate requires the military to furnish adverse information, including historic records that meet criteria, to selection boards considering active duty officers for promotion to O-4 and above. As such, the Board finds the NJP action was within the commander’s authority and the evidence presented does not demonstrate an error or injustice warranting removal of the NJP or show it was unjust or inaccurate as written. Finally, the applicant’s circumstances are not unique compared to other similarly situated officers. Therefore, the Board recommends against correcting the applicant’s records.

**RECOMMENDATION**

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

**CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02026 in Executive Session on 9 Jan 24:

- Work-Product** Panel Chair
- Work-Product** Panel Member
- Work-Product** Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 9 Jun 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 7 Sep 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Sep 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

4/29/2024

X **Work-Product**

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**Work-Product**  
Board Operations Manager, AFBCMR  
Signed by: **Work-Product**